No. 16,465

United States Court of Appeals
For the Ninth Circuit

Union Paving Company, a corporation,
Appellant,

vs.

Downer Corporation, and Ray H. Downer,
Appellees.

BRIEF OF APPELLEES.

Forrest E. Macomber,
Gordon J. Aulik,
711 Bank of America Building,
Stockton 2, California,
Attorneys for Appellees.

FILED
SEP - 9 1959
PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Statement of the case	1
Statement of question presented	6
Summary of appellees' argument	7
Argument	7
Conclusion	17

Table of Authorities Cited

Cases	Pages
Ackerly v. Commercial Credit Co., 111 F. Supp. 92	8, 14
Cohn v. Columbia Pictures Corp., 9 F.R.D. 204 (S.D., N.Y., 1949)	9
Decorative Cabinet Corp. v. Star-Aid of Ohio, Inc., 10 F.R.D. 266 (S.D., N.Y., 1950)	9
Edmonston v. Sisk, 156 F. 2d 300 (CCA 10th)	14
Inter State Nat'l. Bank of Kansas City v. Luther, 221 F. 2d 389 (CCA 10th)	12
Johnson v. Middleton, 175 F. 2d 535 at 537 (CCA 7th)	12, 13
Peninsular Iron Co. v. Stone, 121 U.S. 631	12
Photometric Products v. Radtke, 17 F.R.D. 103, U.S. Dist. Ct. N.Y., 1954	11
Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 202 F. 2d 944 at 947	7, 8

Pages

Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (C.A. 9, 1953) 7

Rumig v. Ripley Mfg. Co., 86 F. Supp. 506 (E.D., Pa., 1949) 9

Sechrist v. Palshook, 95 F. Supp. 756 9

Smith v. Sperling, 117 F. Supp. 781 11

Smith v. Sperling (C.A. 9, 1956) 237 F. 2d 317 9

State of Washington v. U. S. (9 Cir.) 87 F. 2d 421, 427-428 8

Telegraph Delivery Service v. Florists Tel. Service, 12 F.R.D. 342 (U.S.D.C. N.Y.) 13

Ward v. Deavers, 203 F. 2d 72 (App. D. C., 1953) 8, 13

Worcester Felt Pad Corp. v. Tucson Airport Authority, 233 F. 2d 44, Ninth Circuit 10

Rules

Rules of Civil Procedure:

Rule 13(a) 7, 10
Rule 13(b) 7, 10
Rule 13(h) 10

No. 16,465

United States Court of Appeals
For the Ninth Circuit

UNION PAVING COMPANY, a corporation, *Appellant,* vs. DOWNER CORPORATION, and RAY H. DOWNER, *Appellees.*	

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

Appellees do not believe that appellant's statement of the case is sufficient to give this Court a true picture of the basis upon which the District Court dismissed Appellant's Sixth Counterclaim, and for that reason call this Court's attention to the following:

Inherent in the District Court's order of dismissal are findings of fact by the District Court that:

1. Appellant's Sixth Counterclaim arises out of the transaction that is the subject matter of plaintiff's complaint;

2. Appellant's Sixth Counterclaim does require for its adjudication the presence of third parties of whom the Court can not acquire jurisdiction;

3. At the time this action was commenced, Appellant's Sixth Counterclaim was the subject of another pending action.

Appellees believe that this Court in determining this appeal will assume that these findings of the District Court are adequately supported by the pleadings and papers on file herein; but lest there should be any doubt on that matter, appellees call this Court's attention to the following documents on file in this case, which documents appellees will request the lower Court to send up at the hearing of this appeal.

The complaint in this case was filed in the District Court on October 6, 1953. At that time there was another action pending which had been commenced on January 4, 1952. On or about November 6, 1953, appellant in this action filed in this proceeding a motion to stay this proceeding pending a final decision of the State Court action, and in connection with that motion the then attorney for the appellant filed an affidavit in support of that motion for a stay of proceeding, and said attorney's affidavit, among other things, states as follows:

> "5. On January 4, 1952, one R. E. White filed in the Municipal Court of the Bakersfield Judicial District, County of Kern, State of California, a complaint naming Plaintiffs herein, R. H. Downer and Downer Corporation, J. A. Dowling, and Defendant herein, Union Paving Company, as defendants in said Municipal Court action. Summons was served in said action upon all of the said defendants; and they have all filed numerous responsive pleadings and cross-complaints therein

as the attached certified record will show. Subsequently, the said action was transferred on motion for change of venue to the Municipal Court of the City and County of San Francisco, State of California; and from said San Francisco Municipal Court to the Superior Court of the State of California in and for the City and County of San Francisco, where said action is now lodged and numbered 416,818 and pending.

6. The complaint of said R. E. White in said state action is for specific performance of a certain alleged contract with plaintiffs herein R. H. Downer and Downer Corporation; and the second cause of action of said complaint is to quiet title to certain sewage disposal equipment to which defendant herein Union Paving Company is alleged to claim an interest. Plaintiffs herein filed an answer and cross-complaint in said state action on February 28, 1952; and on April 4, 1952, defendant herein Union Paving Company filed its answer and cross-complaint in said state action. It is said cross-complaint of the Union Paving Company filed April 4, 1952 in said state action which directly puts in issue the identical facts and issues and involves the identical parties as are involved in this federal action. For example, see the certified copy of said cross-complaint contained in Exhibit 'B' attached to this motion and note that the *same* written Mount Vernon Joint Venture Agreement attached to said cross-complaint as Exhibit 'C' as is attached to plaintiff's complaint herein as Exhibit 'A'.

7. The first cause of action of said cross-complaint deals specifically with the property to which the said state court plaintiff, R. E. White,

sought title. Union Paving Company's said first cause of action alleged the formation of a joint venture under the terms of said Mount Vernon Joint Venture Agreement and alleged that the sewage disposal plant in question had been paid for by and was the property of the Mount Vernon Joint Venture and further alleged that the said R. E. White and R. H. Downer and Downer Corporation had sold and converted the said sewage dispoal property knowing the rights of Union Paving Company as a joint venturer and had failed to account to Union Paving Company for the profits from said sale and that an accounting in respect of said joint venture and in respect of the dealings of the parties was necessary. Said first cause of action likewise alleged a violation of the said joint venture agreement in that Downer Corporation and Downer had refused to bear certain costs and had erroneously charged certain items against said Mount Vernon Joint Venture, all in violation of the terms of the agreement. Thus this cross-complaint of Union Paving Company, by its first cause of action, specifically sought an accounting under the terms of said written Mount Vernon Joint Venture Agreement and alleged that no such accounting had ever been had. The first cause of action also sought $62,000.00 damages against Downer and Downer Corporation by reason of their breach of the Mount Vernon Joint Venture Agreement. The sixth cause of action sought declaratory relief, seeking an adjudication of the rights of Downer, Downer Corporation, and Union Paving Company under said Mount Vernon Joint Venture Agreement. Therefore, as can be seen, the original cross-complaint in said state action, filed

> over a year and a half ago, involved the identical parties and identical issues concerning the Mount Vernon Joint Venture Agreement as plaintiff seeks to litigate here. Moreover, the said cross-complaint alleged that no accounting had ever been had."
>
> * * *
>
> "13. It is the purpose of Union Paving Company to press to a final conclusion the litigation now pending in the state court as speedily as can be done, and, therefore, by virtue of the pendency of said state action as above set out, proceedings in this court should be stayed until the final determination of the said suit now pending in the San Francisco Superior Court."

It will thus be seen that, according to appellant's attorney, as set forth in said affidavit, R. E. White filed an action as plaintiff in the State Court, seeking to quiet title to the Gardner Field personal property; that Union Paving Company claimed to be a joint venturer with respect to said personal property and that R. E. White, R. H. Downer, and Downer Corporation had sold and converted the property knowing the rights of Union Paving Company as a joint venturer and had failed to account to Union Paving Company for the proceeds from said sale. Since it is alleged that R. E. White was a joint venturer with respect to the Gardner Field property, along with Union Paving Company, J. A. Dowling, Downer Corporation and R. H. Downer, all of said parties were indispensable to a proper determination of that matter.

Parenthetically, it should be observed that the State Court appointed a receiver, who disposed of all of the remaining personal property from Gardner Field, and that fund was subject to the disposition of the State Court and all of the parties were indispensable in order to determine to whom the fund belonged.

Actually, the Gardner Field transaction is very, very remotely connected with the subject matter of the complaint, and the only connection it has is that the funds to acquire the Gardner Field assets were first advanced by Union Paving Company and then by the joint venture of Downer Corporation and Union Paving Company, and the main purpose of acquiring Gardner Field surplus assets was to use a big sludge pump that was a part of Gardner Field for the purpose of testing out the Mount Vernon Sanitary District installation.

STATEMENT OF QUESTION PRESENTED.

Appellees believe that the true question presented to this Court is:

> May a defendant file and maintain a counter-claim arising out of the transaction which is the subject matter of the complaint, where such counter-claim does require for its adjudication the presence of third parties of whom the Court can not acquire jurisdiction and where at the time of the commencement of this action such counter-claim was the subject of another pending action.

SUMMARY OF APPELLEES' ARGUMENT.

1. Rules 13(a) and 13(b) of the Rules of Civil Procedure, by their plain terms, made mandatory the dismissal of Appellant's Sixth Counterclaim by the District Court.

2. In any event, the District Court had the power and the discretion to dismiss Appellant's Sixth Counterclaim.

ARGUMENT.

Appellant argues that all indispensable parties were before the Court, but that was a matter for the District Court to decide, and, as heretofore stated, R. E. White was a joint venturer with Union Paving Company, J. A. Dowling, Downer Corporation, and Ray Downer, and his rights could not be determined without his presence as a party to the proceeding.

In the case of

> *Pische Mines, etc. v. Fidelity-Philadelphia Trust Co.,* 206 F. 2d 336 (C.A. 9, 1953),

cited by appellant, this Court held that the counterclaim of Pische was not subject to a *mandatory* dismissal (italicizing ours) because it was supported by an independent ground of federal jurisdiction. Also, the debenture holders' committee was not an indispensable party to the action on the counterclaim. It is interesting to note that in the first appeal of the *Pische* case, 202 F. 2d 944, this Court held that a dismissal of the action was imperative because of the absence of indispensable parties, and that case is authority directly in point in support of the order of dismissal made by the District Court.

In:

Ward v. Deavers, 203 F. 2d 72 (App. D.C., 1953)

cited by appellant, the Appellate Court held that the trial Court should have considered whether relief other than rescission should not be granted against parties actually before the Court. In the case at bar, the District Court has already determined that White is an absent party whose presence is indispensable and has, therefore, at least impliedly, found as a fact that:

(a) White is interested in the controversy;

(b) His interest is not distinct or severable;

(c) The Court cannot render justice between the parties before it in the absence of White;

(d) A decree made in White's absence would injuriously affect his interest;

(e) A final determination of the controversy in White's absence cannot be made with equity and good conscience. Therefore, the District Court correctly followed the rule laid down by this Court in

State of Washington v. U. S. (9 Cir.), 87 F. 2d 421, 427-428,

and

Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 202 F. 2d 944 at 947.

In the case of:

Ackerly v. Commercial Credit Co., 111 F. Supp. 92 (not p. 29 as cited by appellant)

cited by appellant, which was a wrongful death case, the Court merely points out that plaintiff could elect

to proceed against one or several joint tort-feasors and could dismiss as against one of said tort-feasors, provided such tort-feasor was not an indispensable party.

The case of

Sechrist v. Palshook, 95 F. Supp. 746,

cited by appellant, also involved joint tort-feasors in a wrongful death case. The Court held the liability of defendants would be joint and several and plaintiff could dismiss against one of the defendants as it was not an indispensable party.

The cases of:

Decorative Cabinet Corp. v. Star-Aid of Ohio, Inc., 10 F.R.D. 266 (S.D., N.Y., 1950);

Rumig v. Ripley Mfg. Co., 86 F. Supp. 506 (E.D., Pa., 1949)

and

Cohn v. Columbia Pictures Corp., 9 F.R.D. 204 (S.D., N.Y., 1949),

cited by appellant, all hold to the same effect as the *Sechrist* case, supra.

The case of:

Smith v. Sperling (C.A. 9, 1956), 237 F. 2d 317,

cited by appellant, is not in point.

As to appellant's argument that the District Court should have proceeded to adjudicate the issue as to the parties before the Court, appellees have already stated that inherent in the Court's decision is a finding that White was an indispensable party to a de-

termination of the Sixth Counterclaim. This is not a joint and several tort-feasor case, and appellant's argument is based upon the premise that it is, and for that reason its argument and authorities are not in point.

Appellant attacks the cases cited by the District Court in its memorandum and order, but it is well settled that this Court will affirm the order of dismissal if the order was properly made upon any ground whatever and whether or not that ground was stated by the District Court. Appellees believe that the cases cited by the District Court are in point.

See:

Worcester Felt Pad Corp. v. Tucson Airport Authority, 233 F. 2d 44 Ninth Circuit.

Union Paving Company is a Nevada Corporation. All of the other parties mentioned are citizens of California.

1. Appellant's Sixth Counterclaim is not a compulsory counterclaim under Rule 13(a) because it requires the presence of a third party of whom this Court can not acquire jurisdiction.

2. It was the subject of another pending action and it is not a permissive counterclaim under Rule 13(b) because it would be a compulsory counterclaim under 13(a) but for the exceptions noted, and the Court can not acquire the presence of White under rule 13(h) and, in any event, it could not be permitted as a permissive counterclaim for the same reasons it can not be permitted as a compulsory counterclaim.

In:

Smith v. Sperling, 117 F. Supp. 781

the Court held that diversity of citizenship exists only when all parties on one side of the controversy are citizens of different states from all parties on the other side. Since White is an indispensable party and his citizenship is the same as the plaintiffs, the Court has no jurisdiction because, as this case holds, "jurisdiction is the threshold issue in every case brought in Federal District Court and every Court is bound to determine such issue for itself even when not otherwise suggested."

The case of

Photometric Products v. Radtke, 17 F.R.D. 103, U.S. Dist. Ct. N.Y., 1954,

holds that if an indispensable party is absent from an action, the Court is obliged to dismiss the action entirely. That case likewise holds that the test of whether parties are indispensable or not is one of substance, i.e., whether plaintiff can obtain relief which will later leave open to absent parties the effective assertion of their rights and whether a party's rights can be protected or not is dependent upon facts of each case. That case likewise holds that in determining whether party is merely necessary or indispensable, the Federal Court must determine (1) whether interest of absent party is distinct and severable; (2) whether in absence of such party, Court can render justice between parties before it; (3) whether decree in absence of such party will have no injurious effect on interest of such absent party; (4) whether

final determination, in absence of such party, will be consistent with equity and good conscience; and if any of such questions is answered in the negative, then absent party is indispensable.

The case of

> *Peninsular Iron Co. v. Stone,* 121 U.S. 631,

holds that unless all parties on one side of the controversy have different state citizenship from all parties on other side, diversity does not exist and Court has no jurisdiction.

The case of

> *Inter State Nat'l Bank of Kansas City v. Luther,* 221 F. 2d 389 (C.C.A. 10th),

holds that compulsory counterclaim being ancillary to claim derives its jurisdiction from same source, whereas permissive counterclaim must rest on independent grounds of jurisdiction. (Certiorari denied.)

In the case of

> *Johnson v. Middleton,* 175 F. 2d 535 at 537 (C.C.A. 7th),

the Court states:

> "If Kelley is an indispensable party to this action the Federal Court has no jurisdiction over the action without him."
>
> * * *
>
> "It seems clear that if his inclusion is essential to confer jurisdiction over the proceeding, then when jurisdiction depends upon diversity of citizenship, if his citizenship is the same as that of *one* of the adverse parties his inclusion in the proceeding must prevent jurisdiction from vest-

ing by extinguishing the requisite diversity." (Emphasis ours.)

The case of

Telegraph Delivery Service v. Florists Tel. Service, 12 F.R.D. 342 (U.S.D.C. N.Y.),

is in point with the instant case. In that case the Court held that where a permissive counterclaim was not directly solely against plaintiff but against persons whom defendant sought to add as parties and there was diversity of citizenship between plaintiff, a citizen of California, and defendant, a citizen of New York, but prospective parties defendant were citizens of California, counterclaim would not be permitted since if they were added as parties defendant diversity of citizenship would no longer exist and Court would be deprived of jurisdiction over counterclaim.

In

Johnson v. Middleton, supra,

the United States Court of Appeals for the Seventh Circuit held, at page 537, that "of course, all persons having conflicting claims to a particular fund are indispensable parties to its disposition." (Citing cases.)

The case of

Ward v. Deavers, 203 F. 2d 72 at 75

holds that: "If this were a suit for rescission the suit would not lie in the absence of Deavers." "There is a general rule that where rights arise from a contract all parties to it must be joined." "He

(Deavers) was an indispensable party because a final decree rescinding the agreement could hardly be made without 'affecting' his interest."

Even where the Court has jurisdiction to entertain a permissive counterclaim, it is entirely within the discretion of the Court as to whether the Court desires to entertain such permissive counterclaim and where, in a case like this, all the parties to the counterclaim are not before the Court, we submit that the Court should exercise its discretion not to entertain such permissive counterclaim.

In

> *Edmonston v. Sisk,* 156 F. 2d 300, (C.C.A. 10th)

the Court states:

> "A Federal Court should not proceed to litigate the same cause of action pending in a state court, where controversy between the parties to Federal suit can better be settled in state court proceeding wherein all necessary parties have been joined and are amenable to state process."

The case of

Ackerly v. Commercial Credit Co., supra cited by appellant, holds that the Court *may* retain jurisdiction in a diversity of citizenship action by dismissing a party *who is not indispensable* but *cannot* retain jurisdiction if joining an indispensable party would not give the necessary diversity. The Court in that case defines an indispensable party (at page 94) "as one having such an interest in the controversy that a final decree cannot be made without *either* affecting

his interest or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience."

Appellant argues that the so-called "Gardner Field" matter was an essential portion of the accounting before the Court, but, as heretofore pointed out, the connection between the Gardner Field transaction, which was a joint venture between R. E. White, Ray Downer, Union Paving Co., J. A. Dowling, and Downer Corporation, and the Mount Vernon Joint Venture, which was a joint venture between Union Paving Company and Downer Corporation, was exceedingly remote. Mount Vernon Joint Venture was a written joint venture whose purpose was to install a huge treatment plant and sewer lines in the Mount Vernon Sanitary District near Bakersfield, California, and the Gardner Field Joint Venture was the purchase by White, et al., of Government surplus, which included a sump pump that could be used in testing the Mount Vernon project, as the new pump ordered for the Mount Vernon project had not arrived, and since White had full control over the sale of the surplus property and was one of the joint venturers in the Gardner Field matter but not a joint venturer in the Mountain Vernon matter, it would be only confusion upon confusion to try this Sixth Counterclaim with the other Mount Vernon Joint Venutre accounting matter.

Appellant argues that there was no other tribunal in which the cause was triable at the time the District Court dismissed Appellant's Sixth Counterclaim. The

memorandum and order dismissing Appellant's Sixth Counterclaim was dated January 9, 1958, and filed January 9, 1958. At that time, the State Court action was still pending. On October 23, 1958, the District Court made an order during a final judgment of dismissal of Appellant's Sixth Counterclaim at the request of appellant so that appellant could appeal from that order; but, as stated, the actual order of dismissal of the District Court was made and filed on January 9, 1958. As stated by Henry C. Clausen, the then attorney for appellant, in his affidavit filed in the District Court on or about November 9, 1953, that State Court action was ready for trial and, to quote Mr. Clausen:

> "13. It is the purpose of Union Paving Company to press to a final conclusion the litigation now pending in the state court as speedily as can be done, and, therefore, by virtue of the pendency of said state action as above set out, proceedings in this court should be stayed until the final determination of the said suit now pending in the San Francisco Superior Court."

Although appellant, through its attorney, represented to the District Court that it intended to try the State Court action immediately, it elected not to do so and did nothing in that action until long after the five-year period had run, and that action was subsequently dismissed by the Court for lack of prosecution. But, as the District Court said in its memorandum and order:

> "Concededly, defendant is left in a peculiar position with respect to its sixth counterclaim, but its

opportunity to assert the claim, contrary to its contentions, is not subject to the whims and caprice of the plaintiffs herein and White. Sans some dereliction on the part of the defendant, its cross-complaint in that action, seeking affirmative relief as it does, will not be affected merely because the action filed by White in the State Court against defendant and plaintiffs may be subject to dismissal (under the provisions of §583 of the California Code of Civil Procedure) for having been pending for more than five years. If the defendant is faced with any difficulty in connection with this cross-complaint, it will arise from its own dereliction in not bringing to issue and trial said cross-complaint within the five year period following the filing of the cross-complaint (See: *Tomales Bay Etc. Corp. v. Superior Court*, 35 Cal. 2d 389, 394, 395)." (Emphasis the Court's.)

CONCLUSION.

Appellees respectfully submit that the judgment of the District Court in dismissing Appellant's Sixth Counterclaim was correct and should be sustained.

Dated, Stockton, California,
September 3, 1959.

FORREST E. MACOMBER,
GORDON J. AULIK,
Attorneys for Appellees.